

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Venedia Larita Campbell and)	File No. 24-CV-913
Martin Alan Smith, II,)	(KMM/DJF)
)	
Plaintiffs,)	
)	Minneapolis, Minnesota
vs.)	August 6, 2024
)	10:10 a.m.
Andrew William Schroeder, Kyle)	
Allen Williams, Paul Franz)	
Albers, Robert Aaron Greer,)	
Drew Scott Clark, John Cameron)	
Haugland, in their individual)	
capacities, City of)	
Minneapolis, and Ramsey)	
County,)	
)	
Defendants.)	

BEFORE THE HONORABLE KATHERINE M. MENENDEZ
UNITED STATES DISTRICT COURT JUDGE
(MOTION HEARING)

APPEARANCES:

For the Plaintiffs: Law Office of Eric A. Rice, LLC
ERIC A. RICE, ESQ.
1 West Water Street
Suite 275
St. Paul, Minnesota 55107

For the Defendants: Minneapolis City Attorney's
Office
TRACEY N. FUSSY, ESQ.
350 South Fifth Street
Suite 210
Minneapolis, Minnesota 55415

Court Reporter: PAULA K. RICHTER, RMR-CRR-CRC
300 South Fourth Street
Minneapolis, Minnesota 55415

Proceedings reported by certified stenographer;
transcript produced with computer.

PAULA K. RICHTER, RMR-CRR-CRC
(612) 664-5162

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good morning, everybody. Let's go ahead and get started by getting appearances on the record, first on behalf of the plaintiff.

MR. RICE: Eric Rice on behalf of the plaintiffs.

THE COURT: All right. Good morning, Mr. Rice.

And here on behalf of the Minneapolis defendants.

MS. FUSSY: Tracey Fussy, Your Honor.

THE COURT: Great. Welcome.

And on behalf of -- is it Ramsey County?

MR. PLAISANCE: Yes, Your Honor. Good morning.
Kevin Plaisance on behalf of Ramsey County.

THE COURT: And can you spell your last name for me?

MR. PLAISANCE: P-L-A-I-S-A-N-C-E.

THE COURT: Okay. And do you intend to offer any argument?

MR. PLAISANCE: No, Your Honor.

THE COURT: Okay. You're sort of, no disrespect, but riding Ms. Fussy's coattails?

MR. PLAISANCE: Yes, Your Honor.

THE COURT: Okay. Very good.

Let's go ahead and start with you, Mr. Rice. I think you've argued to me before. I tend to do this with

1 just a whole bunch of questions.

2 MR. RICE: Yes, Your Honor. I'm happy to defer to
3 the Court's questions and go on the topics that the Court
4 wants.

5 THE COURT: Okay. Great.

6 So I am certainly allowed, if not required, to
7 note the objective reality of the location of both the phone
8 and the mower from the video, correct?

9 MR. RICE: I believe so, Your Honor. So the
10 objective location of those items would be different than
11 what the officer reasonably would have known, and that would
12 be compared to what was put on the affidavit, Your Honor.

13 THE COURT: Right. But at least with respect to
14 the telephone, the objective location is captured on Officer
15 Schroeder's own body cam video, correct?

16 MR. RICE: Well, to the best of our knowledge,
17 Your Honor. And I want to address that video because it
18 starts about an hour after they first observed the vehicle,
19 and it stops about an hour before the search warrant
20 affidavit is prepared. And in those gaps, we don't know if
21 officers moved the phone, if Officer Schroeder communicated
22 different information about where the phone was originally
23 at.

24 THE COURT: But under this theory, anybody always
25 could ever perpetually allege a false search warrant because

1 they could just simply say, oh, sure, the video shows the
2 gun in X place, but we don't know if it was moved. And that
3 would be, under your suggested hint there, enough to survive
4 a motion to dismiss.

5 MR. RICE: Well, in this matter, I will say that
6 we're on a motion to dismiss posture, so this is not summary
7 judgment. The plaintiffs have not had the benefit of
8 engaging in discovery. All plaintiffs need to allege is a
9 reasonable, plausible possibility that the phone was not as
10 the officers described or the location of the phone as
11 captured on the video does not support the officers' arrest
12 and search of the plaintiffs' home.

13 THE COURT: Okay. But my question is much more
14 focused. You are not alleging anywhere in your complaint
15 that I can see that the phone was found anywhere other than
16 what was shown on Officer Schroeder's body cam video,
17 correct?

18 MR. RICE: Correct. It's not affirmatively
19 alleged, but we ask the Court that it be a reasonable
20 inference that the phone may have been moved or that Officer
21 Schroeder had different information about the phone --

22 THE COURT: Isn't this precisely what *Iqbal*
23 counsel is against in terms of assuming really malicious
24 intent? I mean, it's one thing for you to highlight
25 correctly -- I have lots of questions about this -- that the

1 location of the phone was somewhat mischaracterized in the
2 search warrant. It's another thing for you to add on this
3 whole layer of, and who knows, it could have been anywhere,
4 which is what you're asking me to do now without it being
5 alleged and with me having body cam video showing where it
6 at least appears to be discovered.

7 Under that sort of idea, every search warrant
8 ever, every body cam video ever, it's all for grabs.

9 MR. RICE: Not necessarily, Your Honor. And I
10 would point the Court to the beginning of the --

11 (Court reporter interruption.)

12 MR. RICE: I would direct the Court to the
13 beginning of the body camera video where Officer Schroeder
14 himself says that the phone was in the alley. We don't know
15 how he got that information, if the phone may have
16 originally been fully in the alley and may have been handled
17 by officers. So this is not a case where there is literally
18 no evidence, no possibility.

19 Here, Officer Schroeder himself on the video says,
20 "The phone was in the alley," as the video starts, and that
21 allows the plaintiffs to claim a reasonable inference that
22 the phone may have actually been in the alley before the
23 video recording started. And we'd ask the Court to draw
24 that inference in favor of the plaintiffs at this stage.

25 Obviously, if summary judgment reveals that

1 Officer Schroeder did not actually receive any information
2 and is maybe a bit loose with his characterization or was
3 told the phone was in the alley but the officers on scene
4 didn't handle the phone, then on summary judgment, that
5 would be a different issue.

6 But here today, we don't have the benefit of
7 deposing the Ramsey County officers. As the Court has seen,
8 the plaintiffs have made good faith and diligent efforts to
9 get as many records available as possible, to come to the
10 Court with the best possible allegations, but the issue is
11 that the plaintiffs have been litigating this case for a
12 year and a half. They brought a lawsuit against the City.
13 The City, even though ordered to disclose relevant records,
14 did not. The video that's attached to the answer here,
15 which I think the parties would not dispute is relevant, was
16 not disclosed by the City pursuant to the previous order --

17 THE COURT: Okay. But we've got it now. I mean,
18 I recognize you're raising a general obstruction suggestion,
19 but right now we have the video. And the video starts when?

20 MR. RICE: About an hour after Schroeder and
21 Williams first observed the men near the vehicle.

22 THE COURT: Okay. And you are suggesting that
23 your complaint supports an inference that we -- that the
24 video doesn't actually capture the original location of the
25 phone, or necessarily so. And for support for this, you

1 point to both the incomplete timing of the video and the
2 fact that he originally is heard saying -- "he," being
3 Officer Schroeder -- "The phone was found in the alley."

4 MR. RICE: That's correct, Your Honor. If Officer
5 Schroeder says that the phone was found in the alley, then
6 the plaintiffs should be entitled to an inference that the
7 phone was in the alley.

8 THE COURT: Okay. So the idea, you know, from
9 *LeMay vs. Mays* is that videos are relevant but not
10 necessarily that we have to assume that they say what the
11 defendants say they say.

12 MR. RICE: My understanding of how videos are to
13 be treated at this stage, Your Honor, is that what they show
14 is generally conclusive unless the video has been modified.
15 But as to what they don't show, from other perspectives,
16 what's not captured, and there's case law that events
17 outside the time of the video, inferences need to be drawn
18 in favor of the plaintiffs here.

19 THE COURT: Okay. Do you have a case where motion
20 to dismiss is denied in a false statement in a search
21 warrant context?

22 MR. RICE: Off the top of my head, Your Honor, I
23 don't have that available. I'd be happy to supplement for
24 the Court.

25 THE COURT: No. I mean, you had your briefing.

1 Do you have a case where summary judgment is
2 denied in a motion -- in a false statement context like
3 this, a false statement in a search warrant context?

4 MR. RICE: I believe I have the cases cited in the
5 brief, Your Honor. I don't have materials beyond that.

6 THE COURT: Okay. Would you agree that the
7 framing that I've got to grapple with here in the qualified
8 immunity context is: Was it clearly established that an
9 officer who applies for a warrant using a deliberate
10 falsehood or in reckless disregard of the truth violates the
11 Fourth Amendment?

12 MR. RICE: I believe that's generally correct,
13 Your Honor.

14 THE COURT: Okay. And there seems to be no
15 dispute that that is clearly established.

16 MR. RICE: Correct. Even in the cases that have
17 found in favor of the defendants, that is the standard
18 courts have enunciated for decades.

19 THE COURT: So here, it isn't a case of whether
20 the law is clearly established, like we sometimes see in the
21 qualified immunity context. It's a case of, are there
22 sufficient allegations from which I could, taking all
23 inferences in favor of the plaintiff, find that the officer
24 employed deliberate falsehoods or applied for the warrant in
25 reckless disregard of the truth.

1 MR. RICE: I believe that's generally the issue,
2 Your Honor. I think my understanding of the issue in this
3 case is, how much allegation or factual matter is sufficient
4 to proceed at this stage? And the plaintiffs would ask the
5 Court to say that this is not a case where the plaintiffs
6 have just baldly alleged that because they disagree with
7 what happened, that it must have been false or there must
8 have been bad faith.

9 The plaintiffs have reviewed the records. They've
10 brought a lawsuit about the records. They have obtained
11 much information. And here we have circumstantial evidence
12 at least that the officers engaged in intentionally false
13 representations, and we'd ask the Court just to allow
14 discovery to occur. Again --

15 THE COURT: So I also have to apply the overlay of
16 if I -- I have to draw inferences in favor of the plaintiff,
17 but under *Iqbal*, they have to be plausible and not legal
18 conclusions. So *Iqbal* deals with allegations that people
19 must have known what was happening in certain contexts and
20 conspired, and the Court in *Iqbal* really rejects the idea
21 that just asserting those things is enough.

22 So here I have to look at the specific alleged
23 falsehoods and if I find that they are, you know, credible
24 based on the allegations in the complaint, combined with the
25 video, then I remove those falsehoods from the warrant or I

1 substitute in the correct not recklessly articulated
2 evidence. And you only state a claim if the corrected
3 affidavit, as it were, fails to establish probable cause,
4 correct?

5 MR. RICE: Essentially, Your Honor. And that's
6 with the search. That's separate from the arrest claims.

7 THE COURT: But the arrest claim, I'm looking at
8 the full universe of the information known as correct. So
9 if I find, for instance, that the corrected search warrant,
10 even crediting that there are some falsehoods, still
11 establishes probable cause, I grant the motion to dismiss on
12 the search warrant claims.

13 MR. RICE: Essentially, Your Honor, but I believe
14 there would be a different standard to search the
15 plaintiffs' home versus arrest the plaintiffs themselves.

16 THE COURT: And for arresting the plaintiffs
17 themselves, what's written in the affidavit is utterly
18 irrelevant. Instead, the lens that I have to apply is what
19 was known to the collective officers at the time.

20 MR. RICE: Essentially, Your Honor.

21 THE COURT: Okay.

22 MR. RICE: And I'd just note that because there's
23 about an hour gap -- the search warrant affidavit was
24 prepared about an hour after the plaintiffs were arrested --
25 and so the arrest was made on less information. And the

1 plaintiffs' position is that even if the Court were to find
2 that there was sufficient cause to search the plaintiffs'
3 home, nothing connected the plaintiffs themselves to this
4 incident and their arrest was unlawful.

5 THE COURT: Okay. The arrest happened and then an
6 hour passes and then the application is filed.

7 MR. RICE: That's my understanding, Your Honor.
8 The arrest of Mr. Smith. I believe Ms. Campbell came out a
9 bit later. But, again, I don't have all of that information
10 because the City has not made it available.

11 THE COURT: Okay. You suggest this theory, this
12 alternative exculpatory theory, about the location of the
13 property being consistent with driving down the alley and
14 discarding items. But we're all pretty aware that the case
15 law doesn't require an officer to include an alternative
16 exculpatory theory in a search warrant, right?

17 MR. RICE: There's case law that requires an
18 officer to consider mitigating or exculpatory evidence.

19 THE COURT: Right, but they don't have to come up
20 with an alternative theory. I mean, there's a difference
21 between mitigating evidence, like an eyewitness who says it
22 wasn't him, and, hmm, if I were a defense attorney, I could
23 argue that these things were discarded by somebody, you
24 know, riding down the alley.

25 Do you have a case that suggests that an officer

1 has to include an alternative exculpatory theory?

2 MR RICE: We're not looking for an alternative
3 exculpatory theory, Your Honor. What we're asking is that
4 the officers consider the totality of the evidence and
5 consider the mitigating circumstances of the evidence.

6 Here, if there had been only a cell phone found
7 near the plaintiffs' driveway, that would be materially
8 different than also finding the lawnmower a yard over and
9 finding the truck at the end of the alley in the parking
10 lot.

11 What the plaintiffs are --

12 THE COURT: But the truck at the end of the alley
13 is in the affidavit.

14 MR. RICE: And what we're asking the Court to
15 consider is not that the officers must come up with some
16 mitigating theory and play defense lawyer, but they have to
17 consider that the phone and the lawnmower and --

18 THE COURT: Do you have any authority for the idea
19 that this is the standard for suing a law enforcement
20 officer? Not that they excluded exculpatory evidence, but
21 that they failed to consider an alternative theory that
22 might explain the evidence that they did include.

23 MR. RICE: Well, again, Your Honor, we're not
24 asking them to consider the theory. That's, I believe,
25 outside the objective analysis of the evidence.

1 What we're asking the Court is to consider the
2 evidence in totality. If you have those three pieces of
3 evidence, do they sufficiently point to the plaintiffs and
4 their property as being criminally involved, and our
5 position is you can't do that with the three locations on a
6 path. If anything, the apartment would have the strongest
7 connection because the truck was parked there. The next
8 would be the mower, and then the next would be the cell
9 phone that was found in the public area outside the private
10 area of the plaintiffs' property.

11 THE COURT: So let's talk about the dog because
12 you repeated -- you say that I should infer that Schroeder
13 saw the dog. I'm not sure if it matters if Schroeder saw
14 the dog.

15 You also say that Williams knew that the dog
16 wasn't one of the three dogs in the backyard.

17 MR. RICE: Correct, Your Honor.

18 THE COURT: You just say that.

19 MR. RICE: Well, we allege that. We allege that
20 based on the fact that it's undisputed that the plaintiffs'
21 dog was not the one seen at the vehicle.

22 THE COURT: Okay. But we have 1:00 a.m. We have
23 three barking dogs in the back. We have surveillance at
24 night of a dog. No color, description. Just a size.

25 I am supposed to assume that because it is not the

1 right dog, that the officer knew it was not the right dog.

2 MR. RICE: That is an allegation and an inference
3 that the plaintiffs are entitled to based on the
4 circumstantial evidence.

5 THE COURT: Distinguish *Iqbal* on this point,
6 because *Iqbal* really drills down on this, "They knew. They
7 knew what was going on." It says that that is not enough to
8 simply allege it. It characterizes some of that as a legal
9 conclusion.

10 Help me distinguish *Iqbal* on the point that
11 Williams knew it was the wrong dog.

12 MR. RICE: Certainly, Your Honor. So the case law
13 is clear, though, that you can prove these sorts of things
14 through circumstantial evidence. We don't need a report
15 saying -- you know, with hidden cameras saying Williams knew
16 it was the wrong dog. But we do have circumstantial
17 evidence.

18 The circumstantial evidence is that Schroeder and
19 Williams were observing the victims' vehicle. Williams then
20 claims that some people with a dog go to the vehicle. Then
21 separately -- and, again, we don't have full information on
22 this point -- but Williams claims that he is 100 percent
23 certain that the dog in the plaintiffs' backyard is the one
24 seen by the vehicle.

25 THE COURT: Does he say, "100 percent certain"?

1 MR. RICE: Well, on Schroeder's body cam, another
2 officer relays that to Schroeder in the alley.

3 THE COURT: He says, "100 percent certain"?

4 MR. RICE: Correct.

5 THE COURT: He said -- Williams said he's 100
6 percent certain.

7 MR. RICE: Correct. So in the alley --

8 THE COURT: Okay. And so you want me to infer
9 somehow that that's a lie. So distinguish *Iqbal* on this
10 very point, on the knowingly lied.

11 MR. RICE: Because it wasn't the same dog.
12 Nobody --

13 THE COURT: I understand that. I understand it's
14 not the same dog. I mean --

15 MR. RICE: So there's that fact, that that is not
16 the same dog, and the circumstantial evidence and intent is
17 that you have two officers, Schroeder and Williams, who are
18 determined to get into somebody's house and to make arrests
19 in this case. Schroeder is determined to get into the
20 plaintiffs' home based on false and incorrect information.
21 The video shows that he wrongly believes that this is a
22 north side gang member's house. He is with Williams about
23 an hour before, and there may be discussions an hour
24 afterward, but the officers collectively had an intent at
25 any point -- or at any purpose to get into this home.

1 And so the circumstantial evidence we'd ask the
2 Court to draw is that the plaintiffs' dog was not, in fact,
3 seen by the vehicle; that Williams did not denote any sort
4 of doubt about the dog being seen at the vehicle; and that
5 he was working with Schroeder, who had a mutual purpose to
6 get in the plaintiffs' home and make arrests based on this
7 incorrect information that it was a north side gang member's
8 house.

9 THE COURT: Let's say they had a mutual purpose to
10 get inside the home. You expect me to infer from that goal
11 to get inside the home. Let's say their purpose is that
12 they believe that these people were involved in the
13 shooting. Then I infer lies.

14 MR. RICE: Well, yes, Your Honor. They made the
15 lies in order to support getting in the home. You can see
16 on Schroeder's video even, he wants to go in the house. He
17 asks the supervisor, "Can we just go in?" And the other
18 officer says, "No. We need a search warrant." And so
19 Schroeder drafts one based on --

20 THE COURT: Right, I've got it. You make a strong
21 case for their desire to get in the house. How am I
22 supposed to assume he's lying? I'm supposed to assume from
23 his desire to get into the house, that when he looks through
24 the fence in the middle of the night, sees three dogs and
25 says, "I'm 100 percent sure one of those dogs is the dog I

1 saw across the parking lot," that is a lie?

2 MR. RICE: So if you have someone's intention to
3 get to an objective and a person saying false information to
4 get to that objective, I think the plaintiffs are well
5 within their rights to say that that is an adequately
6 pleaded lie or false allegation. Otherwise, again, the
7 Court would essentially be requiring not circumstantial
8 evidence but --

9 THE COURT: Slow down, please.

10 MR. RICE: -- direct evidence.

11 THE COURT: Ms. Fussy cites one of the cases --
12 and I'm not sure it really applies here; it's one of the
13 things I'm going to talk to her about -- about the idea that
14 subjective intent of the officers is irrelevant. It feels
15 like we're entirely in complete subjective intent land when
16 we're trying to decide whether someone lies.

17 So what do you think about the authority that she
18 cites on that point?

19 MR. RICE: Well, the case law is a little
20 confusing, but my understanding would be it's an objective
21 analysis, and so if objectively it's a deliberate
22 falsehood --

23 THE COURT: Yeah. How does that work?

24 MR. RICE: But kind of like the recent Fourth
25 Amendment seizure cases where there's an objective

1 manifestation of, you know, dispersing versus seizing, I
2 would say here's that's my understanding of what the
3 plaintiffs need to hit is kind of an objective manifestation
4 of a false representation. We don't actually need to know
5 whether Williams objectively lied or not, but if it looks
6 like a lie, if it objectively manifests as a lie, then the
7 plaintiffs have successfully pleaded a claim.

8 THE COURT: How am I supposed to apply "doesn't
9 matter if he lied" when the standard is "deliberate
10 falsehood?"

11 MR. RICE: If there's an objective deliberate
12 falsehood, then I think we've reached the standard. But I'm
13 not quite certain as to how to square --

14 THE COURT: Yeah, I'm not either. I don't think
15 it squares very well, honestly. I think that in a case
16 where the standard is deliberate falsehood and reckless
17 disregard, these cases about subjective intent are somewhat
18 less helpful than in other contexts, like would a reasonable
19 officer think certain conduct is excessive force.

20 MR. RICE: Well, and it's challenging, Your Honor.
21 But I also do want to go back briefly to Williams'
22 representations as well. I think this would be a different
23 matter if Williams said, "I think it was the same dog," or
24 "It appears to be the same dog, but I'm not certain." I
25 believe that would show some doubt and some recognition that

1 it could be false, but I'm not trying to do so in bad faith;
2 I'm not trying to make a falsehood in order to support this.

3 THE COURT: So his certainty supports, in your
4 inference, bad faith.

5 MR. RICE: Exactly, Your Honor, because that's --

6 THE COURT: But the Supreme Court has said that in
7 the context of eyewitness identification, despite
8 significant scientific evidence to the contrary, that
9 certainty is a factor that actually supports the viability
10 of an identification.

11 Why wouldn't his certainty actually support his
12 not acting with deliberate disregard?

13 MR. RICE: Well, this is a disputed fact issue.
14 Is the fact that he claims he is certain a good-faith
15 mistake or is it a manifestation of his intentional lie?

16 THE COURT: Okay. Does *Leon* apply here?

17 MR. RICE: I'm sorry. What, Your Honor?

18 THE COURT: *Leon*. The *Leon* good-faith analysis in
19 the Federal Fourth Amendment. Since I am applying the
20 Federal Fourth Amendment, does *Leon* apply in the false
21 search warrant context? I think that's your claim too.

22 MR. RICE: Yeah, I don't believe so, Your Honor.
23 Here we're not alleging that the officers somehow made a
24 mistake or were disconnected. Here we're arguing that
25 Schroeder is kind of in the center of things. It's not good

1 faith to conspire and cause a lie and rely on something you
2 know is a lie.

3 THE COURT: So your point is maybe -- even if the
4 *Leon* framework is relevant, this falls into one of the
5 classically on exceptions where the person knows that the
6 warrant was issued based on falsehood.

7 MR. RICE: That's exactly what the plaintiffs are
8 alleging, Your Honor. And to be clear, and what they're
9 alleging is that Schroeder knew the information was false
10 and conspired with Williams in order to make that false
11 information, you know, occur.

12 THE COURT: Is there any gatekeeping that I get to
13 perform at all, given *Iqbal* and *Twombly*? Let's imagine that
14 every search warrant that turns out not to find anything and
15 the people turn out to be innocent then become subject to a
16 lawsuit on the ground that all of those things were lies.
17 Where is the gatekeeping there? What vehicle do I use to
18 make sure there's more than that?

19 MR. RICE: Well, I think, again, you look at the
20 classic indicators of conspiracy and fraud. What was the
21 intention of the officers? What was reasonably known to
22 them? What did they disclose? What did they not disclose?
23 And --

24 THE COURT: But let's imagine a case where
25 somebody doesn't have videos and they just say, you know,

1 the search warrant affidavit said that they saw me do X and
2 they found Y plainly visible through my window and then Z on
3 surveillance, and all of those things are lies, and they
4 knew they were lies. I am suing you under 1983.

5 Is just asserting that they are lies enough?

6 MR. RICE: No. But I believe in the Court's
7 hypothetical, if an officer did observe something false and
8 then -- or observed A but then described B, that would be
9 enough at this stage. Again, the whole purpose of this
10 litigation is to allow the plaintiffs to move forward to
11 discovery to find out information and to resolve --

12 THE COURT: But in the dog context, this is
13 exactly what you're doing.

14 In the phone context, you've got a point. The
15 phone is clearly on this line that is right between driveway
16 and alley.

17 The mower is certainly not in the rear of their
18 house.

19 But the dogs, you're just expecting me to accept
20 because you say he must be lying, that he is lying.

21 MR. RICE: What we're arguing is that he had
22 direct observation of that situation. This is not a
23 situation where he misinterpreted data or surveillance video
24 or got an incomplete report.

25 THE COURT: So because he saw it and is wrong, it

1 must have been a lie?

2 MR. RICE: Not it must have been.

3 THE COURT: A dog misidentification.

4 MR. RICE: But the plaintiffs are allowed to
5 proceed on their claim because that is enough, with
6 inferences and circumstantial evidence, to plead a claim
7 that this officer made an intentional falsehood. Otherwise,
8 if we were to have to prove our case beyond a reasonable
9 doubt defeating the defendants' inferences, how could any
10 plaintiff reasonably do that at a motion to dismiss stage?

11 And, again, I would encourage the Court to look at
12 the case here. The plaintiffs -- our position was we did
13 not have enough facts to allege this matter at the onset.
14 Even though the plaintiffs were woken up in the middle of
15 the night and even though they were not connected, that was
16 not enough to move forward with a lawsuit here, and so they
17 didn't. Instead, what they did is they requested the
18 records --

19 THE COURT: I understand, but I'm not quite sure
20 what that has to do with me viewing this complaint on the
21 videos, on their own four corners. The history of
22 Minneapolis trying to prevent you from getting the
23 information is disturbing, but what does that have to do
24 with this?

25 MR. RICE: Well, I'll tell you precisely, Your

1 Honor, is because the Court's gatekeeping function is to try
2 to process out kind of frivolous claims that the defendants
3 should not be subjected to but allow potentially meritorious
4 claims to proceed.

5 And here, that's what happened during that record
6 request is the plaintiffs were able to get enough
7 information, were able to learn enough and corroborate
8 enough material to say that there is at least a factual
9 dispute, there is circumstantial evidence, there's
10 inferences that should be drawn in their favor because now
11 we have the officers' direct materials. This is not a case
12 where the officers made a false claim but we don't know why,
13 we don't know whether it could be an innocent mistake or
14 something like that. We have materials supporting that
15 Williams directly observed the vehicle, and what he claims
16 to have observed was false, and that is -- his false claim
17 is aligned with Schroeder's mutual interest in getting into
18 the plaintiffs' house and arresting them.

19 THE COURT: Okay. You have a claim for -- a 1983
20 claim based on the destructiveness of the search, right? Am
21 I right in understanding that that stands regardless of your
22 Claims 1 and 2 on the validity of the warrant?

23 MR. RICE: I believe so, Your Honor.

24 THE COURT: So someone can bring a 1983 claim, not
25 a state law claim or a tort claim, but a 1983 claim based on

1 an unnecessarily destructive search.

2 Do you have any cases that stand for that idea?

3 MR. RICE: I do, Your Honor. I could take some
4 time to look them up. But, essentially, the manner of the
5 search needs to be reasonable.

6 THE COURT: Okay. And so regardless of everything
7 else, we have a claim that the SWAT, the breaking down the
8 door, the chaos, the failure to return the cell phone, the
9 damage in the home, are unreasonable and that gives rise to
10 its independent basis for 1983 relief.

11 MR. RICE: Correct, Your Honor. That's my reading
12 of the law is that the manner needs to be reasonable, and
13 that would be a separate consideration from the search
14 warrant itself or undertaking the search itself.

15 THE COURT: Okay. Your vicarious liability claim,
16 is that a state law claim?

17 MR. RICE: Correct, Your Honor.

18 THE COURT: So it doesn't attach to the 1983. It
19 attaches to the -- okay. Got it.

20 MR. RICE: Essentially, it's a state tort claim,
21 Your Honor. At this time I don't believe we're alleging any
22 sort of direct 1983 liability to the municipalities.

23 THE COURT: No *Monell* or anything?

24 MR. RICE: Correct, Your Honor.

25 THE COURT: Okay. Thank you.

1 MR. RICE: Thank you.

2 THE COURT: Come on up, Ms. Fussy.

3 So I am going to be candid. I am really troubled
4 by the first argument you raised in your motion to dismiss
5 about res judicata. You don't have any cases that res
6 judicata, a second case after an attempt to get data. It's
7 not even the same defendants. It's not even the same
8 conduct because it is trying to gather information. It
9 isn't alleging the violation of rights. You spend pages
10 requiring -- 16 pages by opposing counsel, and you abandon
11 it in a footnote. So tell me what's up with that.

12 MS. FUSSY: Certainly. Yes, we absolutely abandon
13 it. I had a case years ago in state court with the same
14 kind of -- not a data practices request -- and if I can just
15 say briefly, I feel like the City's reputation is sort of
16 being maligned with respect to --

17 THE COURT: Yeah, and I want to give you a chance
18 to talk about that.

19 MS. FUSSY: Okay. Thank you.

20 So in that case, there was -- when I was
21 researching that case, it was clear that you have -- if you
22 decide -- if you affirmatively decide to bring a lawsuit
23 against a defendant, you have to bring everything that --

24 THE COURT: Absolutely, but MGDPA is completely
25 different.

1 MS. FUSSY: I didn't know that.

2 THE COURT: Okay. I mean, it seems intuitive to
3 me. Like when I started reading your argument, I really --

4 MS. FUSSY: Okay. But the cases I saw before,
5 they were completely different. Like you could bring a
6 bankruptcy and employment law. It wasn't like they need to
7 be the same thing.

8 And then also the research shows that privity
9 argument too.

10 So yes, I brought that argument. I thought that
11 was the correct argument, and then I read his memo, and I
12 realized he was right and so I thought I did the right thing
13 by saying --

14 THE COURT: Yeah, you did. Yeah. I really
15 appreciate that explanation, and it always takes some
16 hutzpah to fall on your sword and to withdraw an argument.

17 MS. FUSSY: I don't have any problem with that
18 because my integrity is absolutely everything. I'm not
19 going to bring a false claim. And if I think that an
20 officer did something wrong, I'm going to settle the case
21 and I'm going to talk to the chief of police about, we can't
22 do this anymore. And I did that for two years when I was
23 working on the DOJ and the MDHR stuff. That was my job.
24 I'm not going to --

25 THE COURT: Raise a claim that you don't think has

1 merit.

2 MS. FUSSY: Absolutely not.

3 THE COURT: All right. I'm persuaded.

4 MS. FUSSY: Well, okay. And so then can I also
5 just --

6 THE COURT: Yeah, so this is what I really wanted
7 to hear your take on --

8 MS. FUSSY: Thank you.

9 THE COURT: -- because the plaintiff characterizes
10 this as, you know, this attempt to hide the truth, this
11 refusal to agree with the court order I think is part of the
12 characterization and everything else. So I wanted to get
13 your two cents on that.

14 MS. FUSSY: Thank you. I totally appreciate that.

15 So when Mr. Rice brought the lawsuit, I talked to
16 our responsible -- the clerk's office that goes through all
17 this stuff and I'm like, what's the deal? They said it's
18 investigative data. And so then I talked to our sergeant,
19 Sergeant Albers, and he said that the Hennepin County
20 prosecutors are refusing to release this information.

21 So I read the police report and I'm like, you know
22 who did it. It's not these guys. Everyone knows it's not
23 these guys. So why won't you just release what's related to
24 just them? I understand that there is data in this
25 complaint. There are going to be body camera. There's

1 going to be private investigative data related to other
2 people, but --

3 THE COURT: Is that what the concern of Hennepin
4 County was, that the investigation was still ongoing or that
5 the --

6 MS. FUSSY: Yes. That's what they claimed.

7 THE COURT: -- the information would affect other
8 defendants?

9 MS. FUSSY: They claimed that the whole thing was
10 investigative data and they weren't going to release it.
11 And then they strung me along and they're like, we think
12 we've got the guy; we think he's going to confess; we're
13 going to bring him in; blah, blah, blah. And then I would
14 relay.

15 This was like months. This was probably like six
16 months -- correct me if I'm wrong, Mr. Rice -- where I was
17 like -- finally I just said, look, I don't care if you have
18 the data; we don't care if you have the data; we want you to
19 have the data; they're not letting us release it; my people
20 won't release it; bring a lawsuit; I won't oppose it. And
21 that's what happened.

22 And so then after we got the order, which I did
23 not oppose because it's the right thing to do, and also now
24 we're covered because a judge has said give him the stuff,
25 so now what that allowed, though, is not for them to have

1 absolutely everything. It's what's related to them, right?

2 And so later, they -- the allegation now is that
3 we withheld information that they had a right to. But when
4 I talked to -- then went back and looked, I was told, well,
5 this stuff, we didn't know that this would have been
6 relevant to them. And so you have different people.

7 I handed it off to the data practices people to do
8 their job. They didn't know, like, the nuances of this
9 case. The nuances of this case, there are going to be --
10 then there's videos or some evidence and documents that they
11 didn't have that I felt like, well, this is relevant because
12 this shows where this is or some fact that I put in my memo
13 that I thought was relevant to the determination of whether
14 there was probable cause or whether there was lies or
15 whatever. And so from that, he's inferring that there is
16 more data out there that they're entitled to, and --

17 THE COURT: I think he's also implying that --
18 he's inviting me to assume that because it took some time to
19 get this information, that that supports the idea that there
20 are lies. I think that's sort of the invitation.

21 MS. FUSSY: Okay. But let me just say then he
22 would be claiming that the lies are from me or the data
23 practices people?

24 THE COURT: No, no. I think it's a bigger picture
25 idea that the reason this is being resisted is because it

1 covers up lies.

2 MS. FUSSY: I think that --

3 THE COURT: Wrong?

4 MR. RICE: Your Honor, could I speak for myself?

5 THE COURT: Sure.

6 MR. RICE: The reason that the plaintiffs raised
7 the issue of the records primarily is to show that even if
8 partial records are produced, there's still additional gaps,
9 and within those gaps may be relevant materials that
10 undermine the defendants' claims.

11 THE COURT: I see. Thank you.

12 MR. RICE: For example, the body camera video the
13 defendants have produced, that we didn't have original
14 access to, actually supports the plaintiffs' claim in
15 certain aspects. We would ask the Court to take seriously
16 the gaps in the information before it.

17 THE COURT: Got it. All right.

18 So, Ms. Fussy, first of all, I think that you've
19 provided a really not only credible, because I know that you
20 take seriously your duties as an officer to the court, but a
21 persuasive explanation for kind of the backstory here, which
22 isn't really before me but has been hinted at, so I really
23 appreciate you sharing your thoughts on that.

24 I do have some specific questions. Do you have a
25 case that grants a motion to dismiss on a falsehood claim

1 where there is some -- this isn't just a case where, hey,
2 they got the wrong guy, right? This is a case where there
3 are some actual inaccuracies in the search warrant. I'm
4 most troubled -- I'll be candid, I am most troubled by two
5 of them.

6 The claim that he was fleeing. Nobody said
7 fleeing. They said, came out, went back in.

8 And I am troubled by the mower is in the back of
9 their house. It is clearly -- and I really actually
10 appreciated your photograph because it helped me visualize
11 kind of the relationship of these spaces -- the mower isn't
12 in the back of their house. It is in the neighbor's yard,
13 next to the neighbor's -- so those are the two.

14 You know, I think the phone, we're in a little bit
15 of a potato/potato region about that being right on the line
16 between the driveway. It's definitely the driveway. I
17 accept opposing counsel's observation that that driveway is
18 short and that most of the property is behind a fence, but
19 we kind of -- those of us who know St. Paul know that,
20 right?

21 And, frankly, the dog, I'm less persuaded that I
22 can even infer a falsehood.

23 But the mower -- I'm not saying I've decided.
24 I've got a lot of work to do. But the mower and the fleeing
25 bother me the most.

1 So do you have a case that grants a motion to
2 dismiss when there is pretty credible allegations of a
3 meaningful disconnect between the information known and the
4 way it was put into the affidavit?

5 MS. FUSSY: Well -- oh, a judgment on the
6 pleadings?

7 THE COURT: Yeah, something at this stage as
8 opposed to the SJ stage which, as we know, is a pretty
9 important distinction.

10 MS. FUSSY: Yeah. I mean, that is a great
11 question, and I feel like that's a constant question that I
12 get from the judges. And my thought for that is I don't
13 really think the analysis is different. The difference
14 is --

15 THE COURT: Of course it's different.

16 MS. FUSSY: -- you accept the -- but can I just --

17 THE COURT: Inferences. I can fill in those gaps
18 on --

19 MS. FUSSY: But you have to at least allege it,
20 right? And they're not alleging the affirmative facts that
21 are needed here. And so then once that happens -- if they
22 allege these facts -- not conclusions, right, but facts and
23 reasonable inferences that rely from them, then there is no,
24 in my opinion, distinction on the law that you follow after
25 that. The issue is, what do you accept as true? What are

1 you required to accept as true?

2 But then on top of that, there's sort of an added
3 layer of these deliberate falsehood cases. And if you look
4 at *Morris v. Lanpher*, it really lays it out. And I
5 apologize, when I look at the brief, it did not lay this out
6 clearly, but I'm sure you already know all this.

7 THE COURT: Don't be so sure.

8 MS. FUSSY: No, believe me, you do.

9 So number one, it's the plaintiffs' burden to show
10 not only a deliberate falsehood but then also -- it's two
11 things. The affidavit without the falsehoods would not
12 support the PC. So what they require is specific --

13 THE COURT: The corrected falsehood, right? Like
14 so with the mower -- just making sure I understand, with the
15 mower, it's not that you have to pretend there's no mower.
16 It's that you have to specify that the mower is in the
17 neighbor's backyard.

18 MS. FUSSY: Yeah. I mean, that's even better
19 facts for me, right? You don't have to take the mower out
20 of the equation, yeah. So there's that.

21 So my thought is -- but it's plaintiffs' burden
22 and then put on top of that the *Iqbal* requirement, right?
23 Where are the affirmative allegations that there's any
24 deliberate -- deliberate intentional falsehood, right?

25 So if I could direct you to page 6 of my memo,

1 that shows the aerial photo, right? And so if you look at
2 that and then you cross-reference it with page 4 of my
3 memo -- now, if you look at page 4, there's a red car that's
4 right behind a white garage. That's the neighbor's -- no,
5 that's their property, right? So then you see the phone is
6 right there. It's right next to this house.

7 But now if you look over again at page 6, they
8 refer to that as an alley but, like, where does the alley go
9 to? There's no outside -- it literally looks like a
10 driveway to me because it's on their property and it doesn't
11 extend all the way through, so it behaves as a driveway. It
12 doesn't even behave as an alleyway.

13 THE COURT: That little stop?

14 MS. FUSSY: Yeah. Like if you go --

15 THE COURT: I think we're assuming that's the
16 driveway in question.

17 MS. FUSSY: Yeah. So I don't understand how it's
18 not even in the alley then.

19 THE COURT: The fact that it's on the line between
20 the driveway -- I'll allow Mr. Rice to correct me if I'm
21 misapprehending, but I think that what he's arguing is that
22 it's said to be in the driveway. It's not that that
23 shouldn't be characterized as a driveway. It's that the
24 actual location of the phone isn't in a driveway. It's on
25 the line -- at most, on the line between the driveway and

1 the alley, which is as consistent with tossing something out
2 the window as it is with pulling into the garage or near --
3 you know what I mean?

4 So I don't think he's quibbling with whether that
5 stumpy thing is a driveway. I think his point is the phone
6 actually isn't in the driveway in an incriminating way. It
7 is right on the edge in a publicly accessible way. I think
8 that's his argument. And you can kind of see it on the body
9 cam.

10 MS. FUSSY: Okay. So then the issue is then if
11 you look at page 4, you see like past where the -- yeah, I
12 mean, maybe it's on the line -- fine, it's on the line. But
13 I don't know that if you look at the search warrant then, if
14 that's like such a deliberate falsehood that would
15 materially change anything. That's where it is. But I
16 guess you got there already.

17 Now, with respect to the lawn mower, yeah, it was
18 definitely in their yard. And the only thing I can think
19 of, and I don't have any way around this, is that perhaps
20 the officer thought it's behind their house right next to
21 it.

22 But you're right, should have said "in the
23 neighbor's yard." Unclear that he ever saw the lawn mower
24 and where it was. There's no evidence that he ever looked
25 over into the neighbor's yard. The neighbor --

1 THE COURT: You have a still of that mower. Is
2 that not from Schroeder's body cam?

3 MS. FUSSY: I don't recall having a still. We
4 have a still of showing where the lawn mower was found, but
5 the still shows -- it doesn't show in someone's yard. It
6 shows, again, that same area on page 5 of my brief, which if
7 you look at it in color, it would be a lot better than the
8 black and white I have, but it's that same thing where
9 they're basically showing behind the houses. They said it
10 was tucked in behind the garage. That is, inartfully, in
11 the rear of their house. It's just also adjacent.

12 THE COURT: Doesn't it say "tucked in behind the
13 neighbor's garage"?

14 MS. FUSSY: Yes, yes.

15 THE COURT: So we have "tucked in behind the
16 neighbor's garage" turning into "in the rear of their
17 house."

18 MS. FUSSY: Yeah.

19 THE COURT: We have, "walking out the door, seeing
20 police and going back in" turned into "fleeing."

21 And then we have allegations -- I know you say
22 there's no allegations. Paragraph 61, "Falsely claimed that
23 he attempted to flee." Paragraph 60, "Falsely claimed that
24 the victim's lawn mower was located in the rear." Paragraph
25 59, "Falsely claimed the dog" -- I've expressed some

1 questions about the dog lineup, but --

2 MS. FUSSY: If I may talk about the flee then
3 because I don't feel like I have a very strong argument for
4 the lawn mower. It was not correctly stated where it was.

5 Now, the flee, though, think about this: When you
6 watch the video, those dogs are barking for at least 20
7 solid minutes in the middle of the night. They have
8 officers with their lights flashing. They have another
9 officer on a PA system that's telling the occupants of that
10 house to come out through the front door with your hands up
11 repeatedly, repeatedly, repeatedly, repeatedly.

12 Does he come out the front door? No. Does he go
13 when other neighbors are coming around to see what's
14 happening? No. And this is where I talk about his
15 subjective belief of what he's doing doesn't matter. It's
16 where the objectively reasonable officer.

17 I completely believe everything he said he was
18 doing. He probably didn't think this had anything to do
19 with him. Maybe he's a sound sleeper, right? None of that
20 really matters. I mean, it does matter because it's
21 probably the truth, but if you look at what an objectively
22 reasonable officer knows, he doesn't know what's going on in
23 that guy's head, he doesn't know why he's doing it, because
24 he can't know. You can never know, right?

25 So here --

1 THE COURT: But it's not even fast. I mean, he's
2 not like, ah, you know, or slamming or running. Attempt to
3 flee is so --

4 MS. FUSSY: So he goes out the back door, and then
5 the deputies tell him to put his hands up, and he goes back
6 in the front door. So why is he going out the back door in
7 the first place? He's told to go out the front door. That
8 looks suspicious. He characterizes that as a flee.

9 Now, in our brief, I will say we stated that the
10 deputies stated that he had tried to flee, and that is not
11 correct. I talked to my co-counsel about this. I'm like,
12 where is that in the -- he should have use the word
13 "described" because then when he said, "They said these
14 words," I'm like, that's not saying "flee." That's
15 describing these actions. So that was incorrect. We should
16 have used the word "described," and we used the word
17 "stated." They didn't state it, that's absolutely correct.

18 THE COURT: And we have that on the body cam,
19 right?

20 MS. FUSSY: Yes.

21 THE COURT: Okay. I haven't watched that part
22 yet.

23 MS. FUSSY: Yeah, you can hear them saying it in
24 the -- yeah.

25 THE COURT: Okay. So do you have any insight on

1 how I'm supposed to interweave the general rule about
2 subjective intent doesn't matter, with a test that -- and I
3 understand it's a big-picture 1983 rule, but how do I weave
4 that in with a test that requires deliberate falsehood and
5 reckless disregard, which are classic mens rea which require
6 intent?

7 MS. FUSSY: You're right, absolutely right. And I
8 think that you're right, because it requires the mens rea, I
9 looked at the cases again -- I looked at a great Sixth
10 Circuit --

11 THE COURT: You should slow down too because we
12 are -- I am too -- fast talkers.

13 MS. FUSSY: I got excited.

14 I looked at a great Sixth Circuit case, and they
15 kind of laid out -- and I know that's not our jurisdiction,
16 but they interpreted Supreme Court cases so I thought it
17 seemed relevant, and they lay it out. There is definitely a
18 difference.

19 THE COURT: Can you tell me that case because I'm
20 constantly trying to understand in some of these contexts --
21 Mr. Rice raised a really good analogy with the whole intent
22 to restrain versus intent to disperse in those Fourth
23 Amendment kind of crowd control-type cases, which really
24 seems to get into a subjective intent. But that is more,
25 would a reasonable -- could you infer that somebody doing

1 these things has intent to restrain or intent to disperse,
2 whereas here, I have to decide that the officer, Officer
3 Schroeder, used a deliberate falsehood.

4 So can you give me that Sixth Amendment cite? Do
5 you have it handy -- or Sixth Circuit cite?

6 MS. FUSSY: Yes. It's on Westlaw on my computer.
7 I can pull it up.

8 THE COURT: Okay. That would be great. It's more
9 educational than binding.

10 MS. FUSSY: Yes. It laid out a really nice
11 analysis for me. And only then did I fully understand what
12 *Morris v. Lanpher* was actually getting at, and only then did
13 I realize that our brief did not lay it out very nicely.

14 So I'm sorry. Is there a question?

15 THE COURT: No. I was more musing about a
16 difficult-to-integrate set of questions.

17 MS. FUSSY: Yeah, yeah, yeah. So I absolutely
18 agree. So I suppose that like it's probably a mixed bag
19 where sometimes when you're looking at these are the facts
20 and what would an objectively reasonable officer think of
21 when they think -- or think of when they think of these
22 facts and then does that gel with someone who negligently
23 made a mistake or someone who intentionally put in a
24 falsehood.

25 But the other thing that we haven't discussed

1 here, although you did mention it, though, is the whole
2 thing with the dog and possibly the lawn mower too, is --
3 but I don't know for sure about that one -- is that these
4 are facts that are coming from Williams to Schroeder and
5 then coming from another set of deputies to Williams to
6 Schroeder. And as you talked about, it's the collective
7 knowledge.

8 So the whole thing about the dog, yeah, I'm sure
9 it wasn't the same dog, but he gets to rely on that
10 information.

11 THE COURT: Schroeder.

12 MS. FUSSY: Schroeder does, yeah. And see, that's
13 why now if Williams had been a City of Minneapolis -- well,
14 the issue is with Williams at this point, with all due
15 respect, like whether -- and I'm not saying that he didn't
16 make a mistake --

17 THE COURT: If Williams lied to Schroeder, I don't
18 know if that's actionable or not, but Schroeder was entitled
19 to rely on Williams saying it's the same dog, I'm 100
20 percent sure. That's your argument.

21 MS. FUSSY: Yeah.

22 THE COURT: Okay. So one of the things I'm also
23 grappling with in trying to operate this analysis is the
24 idea of collective knowledge, when you can rely on it and
25 when you can't. So it sort of seems like a one-way ratchet,

1 and maybe that's what the law is, meaning Officer
2 Schroeder -- is it Schroeder or Schroeder?

3 MS. FUSSY: I don't even know.

4 THE COURT: Okay. Officer Schroeder is entitled
5 to -- we can assume that everyone has the collective
6 knowledge of everyone. In fact, when we consider probable
7 cause for an arrest, we're supposed to kind of engage in
8 that.

9 MS. FUSSY: As long as there's some amount of
10 communication, correct, Your Honor.

11 THE COURT: But for arrest, even if you can't
12 trace this nugget to that person, you can still have the
13 collective knowledge.

14 But we don't get the collective knowledge of a
15 falsehood. So if Williams is lying -- let's hypothesize.
16 I'm not saying Officer Williams is lying or not lying. But
17 hypothetically, if Williams is lying about the dog,
18 Schroeder is entitled to accept his knowledge, but he is
19 never burdened with knowledge of his lie.

20 Do you see what I mean about the one-way ratchet?

21 MS. FUSSY: Well, I suppose if Williams said
22 something like, "Hey, how about we say it's the same dog,
23 huh?"

24 THE COURT: That's kind of what Mr. Rice says he's
25 saying.

1 MS. FUSSY: But he doesn't allege it, number one.
2 And number two, there's nothing to suggest that that's the
3 case. There's no allegations. There's nothing in the
4 body-worn camera. I mean, they're on camera, that's 100
5 percent the dog.

6 THE COURT: Okay. Let me see. I think I had one
7 other question for you.

8 And whatever the falsehoods are have to alter the
9 probable cause analysis. So let's say I rewrite this
10 warrant, in my head. You know, I did a lot of signing of
11 warrants as a magistrate judge, and then I did a lot of
12 reviewing of warrants as a magistrate judge.

13 So if I rewrite the warrant with the correct
14 things: You know, the lawn mower was in the rear of
15 somebody else's house; the phone was on the line between the
16 publicly accessible parts of the defendants' driveway and
17 the alley; the defendant -- while being yelled at to come
18 out the front, the defendant came out the back; was told to
19 put his hands up, didn't put his hands up and walked back
20 in.

21 If I find that that all still constitutes PC, it
22 doesn't matter under the law if I find an intentional lie --
23 again, hypothetical -- because the intentional lie didn't
24 lead to the search, right?

25 MS. FUSSY: And I apologize if I'm like not fully

1 understanding, but I think it's actually -- it has to be a
2 deliberate falsehood by the person who wrote the search
3 warrant, plus that would have to make a difference in the
4 termination of when it's -- if there would be PC or arguable
5 probable cause here. That's what --

6 THE COURT: Okay. So let me clean up my analogy.
7 Let's say we have a case where a cop deliberately lied and
8 wrote the search warrant. He's the affiant. He lied. But
9 when I fix the lie, the remaining stuff is still sufficient
10 to establish probable cause. Then this claim on the
11 false -- so even finding the falsehood is not enough, it has
12 to undermine PC.

13 MS. FUSSY: I agree, yeah. Yeah. That's the
14 case.

15 THE COURT: And I know that you disagree with me
16 about whether it matters, but you don't know of a motion to
17 dismiss case that dismisses a falsehood allegation in our
18 district or anywhere? I think that's a little telling.

19 MS. FUSSY: Well, okay, but also then can it
20 possibly be clearly established, if we can't even find a
21 case, that's saying it's the other way?

22 THE COURT: Well, it is clearly established --
23 it's clearly established, would you agree, that an officer
24 who applies for a warrant using a deliberate falsehood or in
25 reckless disregard of the truth violates the Fourth

1 Amendment? Would you agree that's the qualified immunity
2 question?

3 MS. FUSSY: Yes. But if I can add a layer on top
4 of that, whether the falsehoods would not support PC is
5 going to be based on whether it was clearly -- it's the
6 second part. Deliberate falsehood, yes, for sure, as it
7 should be. The second requirement, whether the falsehoods
8 would not support -- you know the language.

9 THE COURT: Right.

10 MS. FUSSY: That has to be --

11 THE COURT: But I'm not sure whether that's in the
12 qualified immunity overlay or in the violation of rights
13 overlay, but it kind of doesn't matter because it's fatal to
14 the claim either way.

15 MS. FUSSY: Yeah, I agree, but I think it does
16 matter. Like, I don't think we should lose our qualified
17 immunity simply because there's this other standard that's
18 also very exacting and difficult.

19 THE COURT: Okay. So let's include it in there.
20 Was it clearly established that an officer who applies for a
21 warrant using a deliberate falsehood or in reckless
22 disregard of the truth and had the truth been included, the
23 warrant would have failed to establish probable cause, does
24 that officer -- or was it clearly established that such an
25 officer violates the Fourth Amendment? Would you agree that

1 that's the test? I mean, there's no question that is
2 clearly established.

3 MS. FUSSY: Yes, that is. But then when you look
4 at, okay, well, would the changing and -- you know, the
5 accurate allegations have supported PC, that's where the
6 clearly established lies, I think, but --

7 THE COURT: I agree. So we include it all. Was
8 it clearly established that that two-part test is true?

9 Okay. So sometimes I hear your point about, in
10 the qualified immunity context, that a lack of cases
11 undermines clearly established. Like, you know, I was just
12 grappling with a pepper ball question, right? The lack of
13 cases arguably undermines clearly established in certain
14 contexts.

15 But that's not what we have here. We don't have a
16 question mark about how clear the law is. The law is --
17 it's hard to say in one sentence -- but I think we all agree
18 that it's clearly established that if there's a lie, a
19 deliberate falsehood or recklessness, and if you fix the
20 falsehood, it undermines probable cause, that violates the
21 Fourth Amendment. So the lack of motion to dismiss cases
22 actually has no bearing on whether that law is clearly
23 established. It is clearly established that that is the
24 rule.

25 What I'm saying is the lack of motion to dismiss

1 cases kind of plays into Mr. Rice's observation that when
2 you're pleading a case, the best you can do is point to the
3 things that are false and allege intent. Until you depose
4 Officer Schroeder and Officer Williams, it's very hard to
5 get, yeah, we thought if we bolstered the dog, that would
6 get us into the house. They don't have that access. So
7 instead they can line up a bunch of alleged clear
8 falsehoods, some of which are worse than others, as we've
9 kind of kicked around, and say, he knew it was false.

10 Isn't that enough to survive a motion to dismiss?

11 MS. FUSSY: I don't think so, not under *Iqbal*.

12 THE COURT: So imagine a case where a guy has
13 nothing but this much evidence, which is pretty standard --
14 I mean, more than -- how does he establish that Officer
15 Schroeder lied on purpose when he characterized the guy
16 coming out and going back in as flight when nobody else did,
17 or when he characterized "behind the neighbor's garage" as
18 "in the back of their house," when nobody else did? What
19 more could he be expected to plead other than paragraph 60,
20 falsely claimed?

21 MS. FUSSY: Well, first, it's not our burden, as
22 you know, to establish what he needs to show for affirmative
23 facts, but I've already said there are plenty. On the
24 video -- let's say the body-worn camera video says, hey, how
25 about we say we saw three guys that went into the house from

1 this car that was running right after the murder, how about
2 we say that?

3 THE COURT: He points out that the video didn't
4 start running right away.

5 MS. FUSSY: Yeah, but you find out exactly where
6 the phone is. So he didn't allege that Schroeder knew. He
7 says, and I -- it's right from the complaint, "Williams
8 claimed that he observed three black males." There's
9 nothing saying Schroeder knew it wasn't right because X, Y,
10 Z. "Williams claimed he saw a small- to medium-sized dog,
11 about knee high, with the men."

12 Okay. So here's another thing that he could have
13 showed that it was completely wrong. Let's say that they
14 have a picture and they have a Pomeranian that's -- or not a
15 Pomeranian. They have a Great Dane. That's not a
16 medium-sized dog, right?

17 "Williams claimed two of the men entered the
18 victim's vehicle. He claimed that after a few minutes" --
19 all of these things -- he's claiming Williams said these
20 things.

21 THE COURT: It's later on that he says false,
22 right? It's paragraphs, like 61, 62, 63, falsely claimed.
23 They conspired to say, falsely claimed, falsely claimed.
24 Not just was wrong. But false. Falsely asserted.

25 MS. FUSSY: That's a conclusion. What supports

1 that? *Iqbal* says you have to have something more than just
2 claiming they must have lied. You said that yourself.

3 THE COURT: Yeah, but I was questioning the other
4 guy.

5 Okay. Thank you. Anything else you want to point
6 out?

7 MS. FUSSY: If I could just point out real
8 quickly, regardless of what you determine with respect to
9 Officer Schroeder, there's nothing in the complaint that
10 alleges Albers, Greer, Clark, or Haugland would have had any
11 reason to know anything wasn't exactly as laid out in the
12 search warrant. There is no constitutional vicarious
13 liability. It doesn't exist. And there's no state tort
14 claims in the complaint. So the City of Minneapolis is out.

15 THE COURT: Okay. Hang on, hang on, hang on. We
16 do have --

17 MS. FUSSY: Did I read the complaint wrong?

18 THE COURT: Well, no, I'm not saying that.

19 We have conversion. Conversion of property,
20 that's a state law claim, right?

21 MS. FUSSY: Let me see. I apologize. Maybe he
22 pled it in a way that appeared to be --

23 THE COURT: Although conversion through
24 intentional destruction of property. And that's the
25 state -- I think that's the -- and false arrest and

1 imprisonment. So those are --

2 MS. FUSSY: All right. Yep, got it.

3 THE COURT: But let's talk about Albers, Greer,
4 Clark, and Haugland. You're saying that -- so he alleges
5 that those actors were involved in the arrest.

6 MS. FUSSY: He alleges that they transported them.
7 He alleges another one of them questioned them. There's
8 nothing in there to suggest that any of them would have had
9 any knowledge to suggest that Schroeder was making a
10 "deliberate falsehood" with respect to any of the facts.

11 THE COURT: But when it comes to the arrest as
12 opposed to the search warrant --

13 MS. FUSSY: They're allowed to have collective
14 knowledge, and if the collective knowledge is from Schroeder
15 saying, yeah, we're arresting them --

16 THE COURT: But do we know that? Does he allege
17 that Schroeder is the decider on arrest?

18 MS. FUSSY: You can hear on the body-worn camera
19 that Schroeder is talking to some other guy who says --
20 presumably his superior, who says, okay, bring him out;
21 we're going to bring him out and arrest him.

22 THE COURT: So you're saying that in order for the
23 claims against the other guys to have legs, he would have to
24 allege that they knew that there wasn't enough to arrest
25 them, and he doesn't allege that.

1 MS. FUSSY: He would have to know that the
2 deliberate falsehoods weren't correct or, like, they would
3 have to have reason to suspect, at the very least, that
4 those were not true.

5 THE COURT: Okay. Thank you.

6 MS. FUSSY: Thank you, Your Honor.

7 THE COURT: Okay. Mr. Rice, I've got a couple of
8 questions, but the first one is: Did you want to fix my
9 characterization of the driveway/alley thing?

10 MR. RICE: Your Honor, the plaintiffs' position is
11 I think consistent with what the Court has been saying, that
12 the information needs to be reasonably accurate. So if
13 Schroeder had said that the phone was found at the
14 intersection of the driveway and the alley, the plaintiffs
15 would be satisfied.

16 THE COURT: I guess what I mean is, do you agree
17 that that stumpy thing is what we're calling the driveway?

18 MR. RICE: So the bigger issue, Your Honor, is
19 just that Schroeder should have explained that it was at the
20 intersection of the driveway and the alley, or at least
21 acknowledged that it was within proximity to the alley as
22 well.

23 THE COURT: Your point is not that that thing
24 shouldn't be called a driveway. It is that junction
25 argument.

1 MR. RICE: Correct, Your Honor. Kind of like the
2 rear of the plaintiffs' house. While technically the lawn
3 mower was -- you know, if the plane was drawn at the rear of
4 the plaintiffs' house, it was behind that plane, but you
5 left out essential information that it was found in the
6 neighbor's yard.

7 Here, the essential information that's missing or
8 mischaracterized is it wasn't found solely and completely in
9 the driveway. It was found where the driveway and the alley
10 essentially meet.

11 THE COURT: So I've been looking and looking at
12 your complaint and, you know, you say they conspired. You
13 say they had evil intent. You say they -- well, with
14 respect to the false claims, you say falsely, falsely,
15 falsely.

16 False is something that is untrue, but false isn't
17 necessarily something that is knowingly untrue. That's why
18 when we've got like a false statement prosecution, there has
19 to be an additional element of intentionally. You don't say
20 intentionally lied. You just said, untrue, untrue, untrue;
21 falsely claimed, falsely claimed, falsely claimed.

22 MR. RICE: I believe in the complaint we also did
23 note that they conspired, though, to effect the purpose of
24 an unlawful search and arrest of the plaintiffs.

25 THE COURT: But you don't say, "Knowing it was

1 false, Schroeder said" or "Knowing it was false," do you?

2 MR. RICE: Well, I said that he made the false
3 claim and that it differed and that he had this intention to
4 use the false information to effect unlawful circumstances.

5 I think it's a distinction without a difference,
6 Your Honor. The fact -- I believe, though, if nothing else,
7 it would be a reasonable inference that if an officer has a
8 purpose to effect something unlawful and makes a false
9 statement to do so, that at this stage, certainly the
10 plaintiffs would be entitled to an inference that the
11 officer knew it was false and did that to further the
12 purpose.

13 THE COURT: So when you say -- you're asking me to
14 go there from like paragraph 89, acted with evil intent or
15 reckless indifference, or are you drawing it from your
16 conspiracy claim, Count 4, caused the unlawful arrest by
17 providing false and misleading information, knew that
18 probable cause to arrest -- were under arrest, knew that it
19 wasn't there and then conspiracy, conspired to engage in
20 unlawful search, provided false information.

21 That's where you get an allegation that they did
22 this intentionally as opposed to repeated misstatements?

23 MR. RICE: Correct, Your Honor. I mean, it's the
24 plaintiffs' position that the complaint, certainly read as a
25 whole, alleges that Officers Schroeder and Williams knew

1 that the information was false and intentionally provided
2 that information to effect a search and an arrest that did
3 not otherwise have cause.

4 THE COURT: Okay. Anything else you want to point
5 out?

6 MR. RICE: A couple things, Your Honor.

7 First, I know we're not here to talk about the
8 MGDPA lawsuit, but I will just note to the Court that the
9 plaintiffs did have extensive discussions with Minneapolis
10 about the res judicata and MGDPA proceedings, and I would
11 push back to the extent that the Court or others would
12 suggest that the plaintiffs' concerns about that are
13 unfounded or misplaced.

14 THE COURT: Wait. About the res judicata argument
15 or about not getting enough information?

16 MR. RICE: Both, Your Honor. So --

17 THE COURT: So Ms. Fussy has explained that, you
18 know, she thought she had a good argument, she read your
19 brief, she was persuaded that she didn't have a good
20 argument, and she decided to not pursue it. So you won.

21 You want me to infer more?

22 MR. RICE: I'm just saying, Your Honor, that we
23 had extensive discussions on that issue. I provided, you
24 know, citations and law to their office about that matter,
25 and they still proceeded with bringing the motion and

1 asserting the arguments.

2 THE COURT: Okay.

3 MR. RICE: And then regarding the documents, the
4 video that was not turned over, again, there were extensive
5 discussions about searching for additional materials and
6 getting things like the video that was attached to their
7 answer, and those were not provided until it was attached to
8 their answer.

9 And, again, I know it's a collateral issue, but I
10 would just like to assert that the plaintiffs' concerns were
11 founded and the plaintiffs did communicate their concerns,
12 and they were not resolved until the reply brief by the
13 defendants. But at this stage, the plaintiffs are satisfied
14 that that issue has sufficiently been put to bed.

15 THE COURT: So you believe you have all the body
16 cam video?

17 MR. RICE: We don't, Your Honor, but we believe we
18 have what we're going to get and we have enough to proceed.

19 THE COURT: You think there's body cam video that
20 you don't have?

21 MR. RICE: It would not surprise us, Your Honor,
22 because at every stage we have asked for reports from the
23 municipalities.

24 And I will also push back on Minneapolis'
25 contention that they couldn't disclose the materials,

1 because Ramsey County did. Ramsey County did provide their
2 materials while the other matter was pending, recognizing --

3 THE COURT: Well, I'm not interested in whether
4 they provided the right stuff at the right time. Ms. Fussy
5 advocated hard to get her hands on things. She was dealing
6 with multiple agencies.

7 And at this point, my question to you was not,
8 what did you get when or why? It was, are there body cam
9 videos out there that you do not have?

10 MR. RICE: Yes, there is, Your Honor.

11 THE COURT: Whose body cam video don't you have?

12 MR. RICE: The Ramsey County officers we don't
13 have, and I believe there will be additional Minneapolis
14 body camera videos as well.

15 THE COURT: And the Ramsey County officers were
16 involved on the scene.

17 MR. RICE: Correct, Your Honor. They're the ones
18 who found the phone in the alley, who identified the dogs,
19 who saw the plaintiff at the back of the house, found the
20 lawn mower.

21 THE COURT: And have you tried to get those
22 videos?

23 MR. RICE: I have, Your Honor.

24 THE COURT: And you assume discovery is going to
25 let you do that?

1 MR. RICE: We need to go to discovery to get them.

2 THE COURT: Okay. Anything else?

3 MR. RICE: If I could just --

4 THE COURT: Sure. Take your time.

5 MR. RICE: Yes. Your Honor, so I want to go back
6 and address the Court's question about when is something
7 that's false, you know, intentionally or sufficient. One
8 thing I would also call to the Court's attention in this
9 case is there were multiple misrepresentations and false
10 claims, and they were all to get to a common purpose of
11 establishing the plaintiffs' guilt, which did not exist.
12 And it's kind of like when you roll a dice once and it
13 rolls --

14 THE COURT: Are you using the word "false" to say
15 there are multiple things that we now know to be untrue, or
16 are you using "false" to say things that were known to be
17 untrue at the time?

18 MR. RICE: Well, known to be untrue at the time
19 and are now known to be untrue. So, for example, when
20 Officer Schroeder claimed that the lawn mower was in the
21 rear of the plaintiffs' house, the allegations are that, and
22 the video supports, that he knew that was incorrect at the
23 time, and we also are here today knowing that it is actually
24 false.

25 But one thing I would point to the Court's

1 attention, though, is it's not -- it's like if you roll a
2 dice -- or a die, and it comes up 6 once, you might not have
3 enough to say that it's loaded because it's one data point
4 and die roll 6s all the time. But if you roll it five times
5 and it comes up 6 four of those five times, I believe that's
6 the circumstantial evidence that supports that, you know
7 what, it may or may not, but you can at least proceed past
8 this gatekeeping process to determine -- you know, examine
9 the die, do some analysis, roll it more times, et cetera.

10 And here we don't just have one false claim. We
11 don't just have the dog claim about maybe they made a
12 mistake or he overstated his certainty. It's the dog,
13 combined with the location of the phone, combined with the
14 lawn mower, combined with the fleeing out of the house --

15 THE COURT: Do we have Officer Williams' body cam?

16 MR. RICE: I don't have access to it today, Your
17 Honor.

18 THE COURT: You don't have it yet?

19 MR. RICE: I don't.

20 THE COURT: Do we have Officer Schroeder's body
21 cam for the entire period of time? When does it start and
22 stop that we have Officer Schroeder?

23 MR. RICE: So off the top of my head, like I said,
24 we have about an hour after the vehicle is observed and then
25 about -- I think it's an hour before the search warrant, so

1 in that discrete time frame. I don't know whether that's
2 the complete universe of Schroeder's body camera recordings.
3 There may be recordings that exist in that earlier hour
4 while they're observing. There may be recordings between
5 that hour while he's preparing the search warrant or gets
6 additional information from officers. The plaintiffs can't
7 come to the court today with that information. They've
8 tried.

9 And that's -- again, I don't want to keep harping
10 on the fact that because the plaintiffs tried really hard,
11 they deserve to have their claim go through, but just so the
12 Court can draw the balance properly of what amount of
13 evidence is sufficient to allow plaintiffs to proceed with
14 their claims? Because, as the Court recognizes, it's a
15 challenging position to state with specificity what actions
16 and discussions officers had about things that the officers
17 would not want to reveal.

18 And I'm just asking the Court to recognize that in
19 those gaps, it is reasonable that the plaintiffs would not
20 have that information or be able to allege that information
21 today, but there's enough circumstantial evidence, there's
22 enough smoke that this seems to be a more viable claim and
23 the plaintiffs should be allowed to proceed to discovery.

24 If the plaintiffs get to summary judgment and the
25 best they can stand on is, well, this claim was false, but

1 we have no information even suggesting that the officers
2 could have, should have known, intentionally falsified
3 things, that's a different analysis.

4 What we're asking the Court today is to take
5 seriously that there are gaps in what's available to the
6 plaintiffs; that within those gaps, it's reasonable that
7 there are materials that support the plaintiffs' claims as
8 the newly produced video attached to the answer does. That
9 introduced additional elements not previously known to the
10 plaintiffs that support their claims. That show -- for
11 example in the defendants' opening brief, they ask, "Why
12 would Officer Schroeder make up this stuff about someone he
13 doesn't think is connected to the shooting?" And the
14 plaintiffs at the time of the complaint didn't have a great
15 answer for that. "We don't know why they were selected or
16 hand-picked this house as opposed to the lawn mower
17 house" --

18 THE COURT: I don't think that you have to
19 establish that he believed he was searching the wrong house.
20 You just have to establish that he -- or allege that he lied
21 to get into the house. He could believe fervently that
22 these were the perpetrators of the shooting that had
23 occurred and still be liable under 1983 for making false
24 statements to get in there, right?

25 MR. RICE: Yes, Your Honor, but back to the

1 Court's hypothetical of distinguishing every single
2 incorrect or objectively false claim versus the claims that
3 should proceed, which are kind of beyond that. And here we
4 now.

5 Have additional information that supports this is
6 not just a case where Schroeder followed the evidence and
7 this is just where he ended up. The video shows he
8 incorrectly believed that this was a north side gang
9 member's house, and he got it in his mind that he needed to
10 get in there and he needed to arrest this Rami person which,
11 again, the plaintiffs didn't know about until they got this
12 video.

13 And because Schroeder believed that, because he
14 wanted so badly to get into this house based on wrong
15 information, that's why the Court should find that the
16 plaintiffs have met their burden, because there is an intent
17 here to, at any costs, get into this house and arrest the
18 plaintiffs. This is not a case where Schroeder shows up and
19 follows the evidence. He had a purpose and an objective in
20 mind, and he lied to get to that purpose and objective.

21 And the plaintiffs have pleaded as much as
22 possible to get to that point. The --

23 THE COURT: So this kind of undermines your
24 argument that the SWAT was overkill, right? Like if he
25 believes he's going in there to get a particular person that

1 he believes is both a gang member and in the house and
2 perhaps responsible, regardless of taking out the two named
3 plaintiffs, that puts a different spin on the choice to go
4 in with SWAT, right?

5 MR. RICE: Yes, Your Honor. And I will note that,
6 if the Court looks at the complaint, there are no SWAT
7 members who broke the door named in this complaint. And
8 that is because, with information available to the
9 plaintiffs through their records request, they learned that
10 if you're a SWAT officer arriving at the scene and an
11 officer says, "There's known gang members, they have guns,
12 they're connected to the shooting," and they go and breach
13 the door, to the plaintiffs, that's objectively reasonable
14 for those SWAT officers. They are not named because that's
15 the type of claim that even if objectively incorrect or
16 false, those SWAT officers were acting -- as far as the
17 plaintiffs could tell, acting appropriately based on the
18 information received and engaging in proper police work.

19 The defendants named for the unlawful manner, I
20 believe, is Williams and Schroeder. So the officers who
21 knew that the claims were false, who knew that these were
22 not connected -- or there was not evidence connecting them
23 to the shooters, and that's why they're named in the
24 improper manner case because they're the ones who had
25 knowledge that the breaking the door down and sending the

1 SWAT team in was improper.

2 THE COURT: But they certainly -- you also allege
3 that they believed there's a gang member in there.

4 MR. RICE: Well, we allege that based on a hunch
5 because there was no gang member there. There was nothing
6 connecting --

7 THE COURT: Yeah. I'm just saying you kind of
8 can't have your cake and eat it too. Either there's this
9 conspiracy between Williams and Schroeder to get in there
10 because they believe that this alleged bad actor is in
11 there, which would justify using significant force to go in,
12 or they didn't. Like the fact that supports your conspiracy
13 theory really undermines your "The SWAT was too much"
14 theory.

15 MR. RICE: Well, the cake and having it too is the
16 difference between subjective and objective. Here, as far
17 as the plaintiffs can tell on the video, Schroeder sincerely
18 believed that there were wrongdoers and perpetrators in
19 there. The problem is he didn't have the objective evidence
20 to back it up. And the case law is clear that an officer
21 can't proceed based on hunch or bare suspicion to get into a
22 place or to arrest people. And so the unlawful manner is
23 because the objective evidence didn't exist to support the
24 actions that Schroeder caused.

25 THE COURT: Okay. That's a kind of fine line, but

1 I'll leave it there.

2 You want, I assume, for me to disregard the many,
3 many police reports?

4 MR. RICE: Yes, Your Honor. I think it's
5 inappropriate to consider them at this stage. And based
6 even on the arguments today, it very much feels like a
7 one-sided summary judgment motion where the --

8 THE COURT: All right. Thank you, Mr. Rice.

9 Ms. Fussy, I've got one more question for you.

10 You agree I can't consider those 46 pages of
11 police reports?

12 MS. FUSSY: You know, what I do think you can
13 consider, Your Honor, is because they're not for the truth
14 of the matter asserted, the Ramsey County deputies, what
15 they said there, because that is imputed to Schroeder's
16 knowledge.

17 THE COURT: Yeah, but we're not talking hearsay.
18 We're talking *LeMay* vs. *Mays* and the Eighth Circuit's
19 admonitions about how it's very different, that generally
20 you can't consider matters outside the complaint, that
21 there's an exception for body cam videos because they tend
22 to capture a more objective reality except to the extent
23 their completeness is drawn into question. And, frankly, I
24 think *LeMay* is the one that refused to consider a police
25 report.

1 So is there a case that you can point me to post
2 *LeMay* that allows me to consider 46 pages of one side's
3 discovery at a motion to dismiss stage?

4 MS. FUSSY: No, Your Honor, I don't believe I have
5 a case. If I can --

6 THE COURT: Okay. I cannot consider those under
7 the Eighth Circuit law.

8 MS. FUSSY: Okay.

9 THE COURT: I mean, it's not a hearsay question.
10 You understand that, right?

11 MS. FUSSY: But I think that the problem with --
12 the reason that they -- I understand if it's a one-sided
13 version and it can be incorrect, but the reason I think that
14 you can consider them here is because it doesn't matter if
15 they're incorrect. It doesn't matter if those Ramsey County
16 deputies are lying. It's only about what Schroeder knew,
17 and he's allowed to have collective knowledge too of, like,
18 they're saying these things happened particularly.

19 THE COURT: But this shows one side's version of
20 what Schroeder knew.

21 MS. FUSSY: I agree. And it could be wrong,
22 though. No, no, no. All I'm saying is Ramsey County's --

23 THE COURT: No, no. I'm saying this shows one
24 side's version -- even assuming that these are true or
25 untrue, it showed MPD's version of what Schroeder knew,

1 whereas if you depose Schroeder, let's say he says, oh,
2 yeah, Williams and I went over there before we turned on the
3 body cam video and had a whole conversation about how we
4 needed to tie the dog in so that we could get into the
5 house. That's the other side's version of what Schroeder
6 knew.

7 You're asking me to rely on these to establish the
8 reasonableness of Schroeder's actions. It's a factual
9 record that is supporting your theory, and that's what *LeMay*
10 *vs. Mays* kind of really frowns upon.

11 MS. FUSSY: I understand, Your Honor. I think
12 we're going to have to agree to disagree on this point.

13 THE COURT: But you don't have a case that allows
14 me to consider police reports in a context like this?

15 MS. FUSSY: I don't have a case, correct, I will
16 definitely admit that.

17 And if I could just say one --

18 THE COURT: Yeah. I saw you were getting ready to
19 jump up. I assumed you had one last thing to say.

20 MS. FUSSY: Thank you. I just want to say if
21 there's no conspiracy, then there's no deliberate falsehood
22 on the dog. And plaintiff had said that he wasn't following
23 the evidence, but you have this car that's the victim's car,
24 that's -- they ping the cell phone, and from pinging the
25 cell phone, they find out where the car is, right after this

1 heinous, brutal assault, right? They see three people.
2 Three people were the perpetrators over here, right, at the
3 attempted murder.

4 THE COURT: But they see three men, and one of the
5 perpetrators in the attempted homicide was a woman.

6 MS. FUSSY: We don't know exactly how much the
7 woman looked like a man or not. We don't know about the
8 sizes. They're saying there's three people. They leave
9 here. They go down the block. They lose sight of them
10 right at plaintiffs' house, right? They go down there.
11 They're like, here's the phone, right where we lost them;
12 here's the dog we saw, it's 100 percent that dog.

13 These are all the things that make the probable
14 cause determination at this point reasonable. That's
15 following the evidence. There is absolutely -- it's a
16 logical fallacy to say if the officer makes a false
17 statement, therefore, it's deliberate.

18 And I know we talked about, well, what can
19 plaintiffs do? It's a high standard. It's a high standard
20 because they don't want to overturn all of these things.
21 It's a high standard because this is not a closing argument
22 when they're putting together an initial investigation,
23 right? People make mistakes, right? So they don't want all
24 these things where it's like, you've got the fact wrong;
25 therefore, that's enough to bring a federal case?

1 THE COURT: Well, he's not arguing he got the fact
2 wrong. He points to at least two instances where the fact
3 was described to him as A, and he characterized it as B, a B
4 that is much more incriminating. We've talked about the
5 fleeing, and we've talked about the lawn mower in the wrong
6 yard. Those aren't just, you know, he was told wrong or he
7 got a fact wrong. Those are him taking the information he
8 had, zhuzhing it up to make it more -- I don't know how you
9 spell "zhuzhing" -- to make it more incriminating and
10 including that.

11 So it isn't just faulting an officer, taking
12 inferences in favor of the plaintiff, which we're supposed
13 to do now. I'm not saying this is what will bear fruit. It
14 isn't just faulting an officer for making a mistake in the
15 heat of the moment. It's suggesting that an officer is
16 mischaracterizing what he knows to make it sound worse.

17 MS. FUSSY: I think with respect to the lawn
18 mower, that doesn't look right. There's an argument to be
19 made. I think it's weak.

20 But with respect to the fleeing, no. I think
21 that's completely objectively reasonable for an officer to
22 think, in these factual circumstances, that's what that was.
23 He's not coming out. He's refusing to not come out.
24 They're all in the front yard, as far as he knows. There's
25 deputies in the backyard that are being quiet. He tries to

1 go out the backyard. Oh, they're there. He goes back in.
2 Then he probably is like, well, there's nothing I -- this is
3 from what an objectively reasonable officer would do --
4 there's nothing I can do; I guess I've just got to go out
5 the front and submit.

6 I don't think this is a complete zhuzhing up --
7 which I love the word, by the way -- of calling it a
8 fleeing. I don't think that that's so beyond the pale to
9 say that that's a fleeing. That looks like a fleeing.

10 The lawn mower, is it in the rear of their house?
11 It's -- like he says, if you drew a plane, yes. But you're
12 right, it's adjacent. It's nearby.

13 So there's like one fact, the lawn mower that, in
14 my opinion, that doesn't come across exactly how it should
15 have.

16 THE COURT: Okay. I'm going to wrap this up
17 because I'm already going to be late to a noon meeting in
18 St. Paul, but I really appreciate both of you answering my
19 million questions that are thrown at you in a scattershot
20 manner.

21 Oh, I should give counsel for Ramsey County,
22 Mr. Plaisance, anything you need to chime in?

23 MR. PLAISANCE: No, Your Honor.

24 THE COURT: Are you doing other work back there?

25 MR. PLAISANCE: No, Your Honor.

1 THE COURT: I'm just kidding. I guess that
2 sounded -- it will look meaner on the transcript than it was
3 intended.

4 Anything you need to share or add?

5 MR. PLAISANCE: No, Your Honor, nothing from
6 Ramsey County today.

7 THE COURT: Okay.

8 MS. FUSSY: Your Honor, may I just email counsel
9 and chambers the name of that case from the Sixth Circuit?

10 THE COURT: Yes, that would be great, and I don't
11 view that as supplemental briefing because it's more of a
12 theoretical question.

13 Mr. Rice?

14 MR. RICE: If I could just briefly say two things,
15 Your Honor.

16 The plaintiffs do dispute the description and
17 characterization of the alleged suspects and the location
18 where the officers lost sight of the people seen with the
19 vehicle. So those are the facts that I think would be
20 improper to rely on at this stage to support the defendants'
21 theories.

22 THE COURT: Okay. Thank you very much.

23 And, again, for an excellent argument and for
24 handling my many questions. I recognize that I kind of poke
25 at weaknesses for both sides in my questions. It's how I

1 test out what to do. So I really appreciate your patience
2 and thorough answers.

3 So thank you all very much. Have a great rest of
4 your day.

5 (Court adjourned at 11:36 a.m.)

6 * * *

7

8

9 I, Paula K. Richter, certify that the foregoing is
10 a correct transcript from the record of proceedings in the
11 above-entitled matter.

12

13 Certified by: s/ Paula K. Richter

14 Paula K. Richter, RMR-CRR-CRC

15

16

17

18

19

20

21

22

23

24

25

PAULA K. RICHTER, RMR-CRR-CRC
(612) 664-5162